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ALEXANDER L. STEVAS
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No. 83-1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1252 because the district court held Reorganization Plan No. 1 of 1978 unconstitutional, which rendered unconstitutional the Equal Employment Opportunity Commission's enforcement of the Equal Pay Act in this case.

2. Whether the district court correctly held Reorganization Plan No. 1 of 1978 unconstitutional because it was adopted without bicameral legislative action and without complying with the other requirements specified in Article I of the United States Constitution.

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INTRODUCTION

Appellee Westinghouse Electric Corporation ("Westinghouse" or the "Company") moves, pursuant to Rule 16 of the Rules of this Court, that this Court assume jurisdiction under 28 U.S.C. § 1252 ("Section 1252"). As set forth *infra* at 4-10, the present appeal and the bases upon which Westinghouse sought and obtained dismissal below differ significantly from *EEOC v. Allstate Insurance Co.*, No. 83-1021 (June 11, 1984), in which this Court dismissed the appeal for want of Section 1252 jurisdiction. Because the district court in this case accepted Westinghouse's position that Reorganization Plan No. 1 of 1978, 92 Stat.

3781, was unconstitutional (because it was adopted without bicameral legislative action and without complying with the other requirements specified in Article I of the United States Constitution), jurisdiction exists under 28 U.S.C. § 1252.

Westinghouse further moves that this Court affirm the district court's judgment order on the ground that the questions presented are so unsubstantial as not to require further argument.

STATEMENT

This action was initiated by Appellant Equal Employment Opportunity Commission ("EEOC" or the "Commission") in the United States District Court for the Western District of Pennsylvania as a suit to enforce the Equal Pay Act requirements in Section 6(d) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 206(d). Although the FLSA authorizes only the Secretary of Labor to initiate and prosecute enforcement actions (*see* 29 U.S.C. §§ 206(d)(3), 216(c), 217), the EEOC claimed that its participation was authorized by Reorganization Plan No. 1 of 1978 ("Reorganization Plan No. 1"), 92 Stat. 3781, which purported to transfer Equal Pay Act enforcement from the Department of Labor to the EEOC.

Reorganization Plan No. 1 was adopted pursuant to the Reorganization Act of 1977 ("Reorganization Act"), 5 U.S.C. §§ 901 *et seq.* This Act permitted the President to reorganize certain governmental agencies and, thus, to amend previously-enacted statutes without legislative involvement except in the form of a possible "one-House" veto. *See* 5 U.S.C. § 206(a). After Reorganization Plan No. 1's transmittal to Congress, neither House voted affirmatively to adopt the Plan, nor did either House pass any resolutions of disapproval. Yet, notwithstanding the total absence of affirmative legislative enactment, Reorganization Plan No. 1 became law.

On August 29, 1983, Westinghouse filed a Motion to Dismiss in the district court. Westinghouse's Motion to Dismiss was

premised on the fact that the EEOC lacked a constitutionally-sound basis for participating in actions to enforce the Equal Pay Act requirements in FLSA Section 6(d). Reorganization Plan No. 1, the *alleged* basis for the EEOC's participation in the instant action, effectively amended the enforcement provisions of the Equal Pay Act and/or FLSA without legislative enactment by *either* House or Congress. Because this Court in *Immigration and Naturalization Service v. Chadha*, 51 U.S.L.W. 4907, 4918 n.22 (June 23, 1983), held that "[t]o allow Congress to . . . in effect enact Executive proposals into law by mere silence cannot be squared with Art. I," Westinghouse contended below that Reorganization Plan No. 1 was unconstitutional.[1]

The district court granted Westinghouse's Motion to Dismiss by judgment order dated January 5, 1984. A copy of the district court's judgment order is attached to the EEOC's Jurisdictional Statement in this case as Appendix A.[2]

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[1] Westinghouse's contention below that Reorganization Plan No. 1 was unconstitutional was intertwined with a contention that the Equal Pay Act and/or FLSA, as amended by Reorganization Plan No. 1 and as applied against Westinghouse below, was unconstitutional. Significantly, Westinghouse argued below that it was *unnecessary* for the district court to rule on the severability of the Reorganization Act's one-House veto provision because, even if the one-House veto could be considered severable, the resulting placement of totally unchecked power in the President to amend statutes without legislative enactment (which in fact occurred when Reorganization Plan No. 1 was adopted) would be plainly unconstitutional. *See* text accompanying note 5, *infra*.

[2] On January 30, 1984, the EEOC filed concurrent notices of appeal to this Court and to the United States Court of Appeals for the Third Circuit (at No. 84-3073), respectively. On the motion of Westinghouse and by order dated May 4, 1984, the court of appeals stayed all proceedings in the Third Circuit pending this Court's determination of jurisdiction over the instant appeal under 28 U.S.C. § 1252.

ARGUMENT

I. Jurisdiction Exists Under 28 U.S.C. § 1252

The jurisdictional question presented in this case represents a serious challenge to the mandatory nature of direct review under 28 U.S.C. § 1252. Section 1252 provides a right of direct appeal to this Court from any order "*holding an Act of Congress unconstitutional* in any civil action . . . to which the United States or any of its agencies . . . is a party" (emphasis added).[3]

Westinghouse below sought and obtained dismissal by directly attacking the constitutionality of Reorganization Plan No. 1, which amended the Equal Pay Act and/or FLSA without complying with the requirements in Article I of the Constitution. In the instant appeal, the EEOC attempts to avoid direct review under Section 1252 by redefining the constitutional bases presented by Westinghouse in support of its Motion to Dismiss below.

The present case differs in material respects from the appeal in *EEOC v. Allstate Insurance Co.*, No. 83-1021 (June 11, 1984),

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[3] This Court traditionally has interpreted Section 1252 broadly, affording parties a right to direct appeal even where a federal statute has only "been held unconstitutional as applied to a particular circumstance." *United States v. Darusmont*, 449 U.S. 292, 293 (1981), citing *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947). Similarly, this Court has held that Section 1252 "provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional 'was a necessary predicate to the relief' that the lower court granted." *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982), quoting *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980). *See also McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975) ("The purpose of § 1252 is too plain to allow circumvention").

which this Court dismissed for want of Section 1252 jurisdiction.[4] The instant case, unlike *Allstate*, is appropriate for direct review under Section 1252 because Westinghouse below argued that the entire process by which Reorganization Plan No. 1 was adopted was unconstitutional. Moreover, the various "non-constitutional" issues which were the bases for the EEOC's appeal in *Allstate* were not relied upon by Westinghouse as being essential to its Motion to Dismiss below.

In *Allstate*, the position taken by the defendant-appellee before the district court was summarized by Chief Justice Burger, dissenting from this Court's dismissal for want of jurisdiction, as follows:

> Appellee moved for summary judgment, contending that the transfer of enforcement authority to appellant under Reorganization Plan No. 1 was invalid *because the legislative veto provision in the Reorganization Act [of 1977] was unconstitutional.* Appellee maintained that the legislative veto provision was not severable from the balance of the Act and, thus, that the entire Act was invalid; that the transfer of enforcement authority to appellant pursuant to the Act was therefore invalid; and that, as a result, appellant was without authority to enforce the Equal Pay Act.

Allstate, supra, slip op. at 3 (Chief Justice Burger, dissenting) (emphasis added).

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[4] In dismissing the *Allstate* appeal, this Court relied on *Heckler v. Edwards*, 52 U.S.L.W. 4373, 4375 (March 21, 1984), which adopted the "common-sense view that the constitutional holding must be at issue for direct review in this Court to lie." However, *Heckler* reaffirmed Section 1252's broad Congressional purpose "to assure an expeditious means of affirming or removing the restraint on the federal government's administration of the law *when it would be bound by a holding that the law in question is unconstitutional.*" 52 U.S.L.W. at 4376 (emphasis added; footnote omitted).

Westinghouse's position below was entirely different from the defendant-appellee's position in *Allstate.* Westinghouse emphatically *denied* that Reorganization Plan No. 1's constitutionality depended exclusively on the constitutionality of the Reorganization Act. Westinghouse contended in the brief supporting its Motion to Dismiss, for example, that the district court did not have to evaluate the severability of the Reorganization Act's one-House veto provision because any arrangement whereby the President could effectively amend the Equal Pay Act and/or FLSA without bicameral legislative enactment would "plainly be unconstitutional." Brief In Support of Defendant Westinghouse Electric Corporation's Motion to Dismiss at 4 n.3.[5]

More importantly, when the EEOC responded to Westinghouse's Motion to Dismiss by asserting the various "non-constitutional" defenses also raised by the Commission in *Allstate*—involving severability, ratification and retroactive application of any holding of unconstitutionality—Westinghouse responded:

> *The EEOC's arguments do not address the fundamental constitutional problem that mandates dismissal of the instant action.* Reorganization Plan No. 1's transfer of powers was enacted without the approval of both Houses of Congress, without subsequent presentment to the President, and without any accommodation of the constitutional requirement of separation of powers. Because these prerequisites to lawful legislative action were circumvented during the EEOC's assumption of power to enforce the Equal Pay Act, the EEOC's enforcement of the Act in this case is unconstitutional, and the instant action must be dismissed.
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> * * *

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[5] A copy of the district court Brief in Support of Defendant Westinghouse Electric Corporation's Motion to Dismiss, dated August 26, 1983, has been lodged with the Clerk of this Court.

Reply Brief in Support of Defendant Westinghouse Electric Corporation's Motion to Dismiss at 4 ("Summary of Argument") (emphasis added).[6]

The district court adopted Westinghouse's position that Reorganization Plan No. 1 was unconstitutional because it became law without bicameral legislative enactment.[7] This is indicated in the district court's citation of *Chadha* (51 U.S.L.W. at 4918) for the proposition that "legislation by the national Congress [must] be a step-by-step, deliberate and deliberative process." In addition, the court cited the district court *Allstate* decision as "holding that *Reorganization Plan No. 1 of 1978 . . . is unconstitutional . . . .*" (emphasis added).[8]

Westinghouse Motion to Dismiss below was premised on a *direct* challenge to the constitutionality of Reorganization Plan

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[6] A copy of the district court Reply Brief in Support of Defendant Westinghouse Electric Corporation's Motion to Dismiss, dated October 21, 1983, has been lodged with the Clerk of this Court.

[7] The lower court's judgment order, as noted previously, is attached to the EEOC's Jurisdictional Statement as Appendix A.

[8] The district court's reliance upon the lower court decision in *Allstate* (570 F. Supp. 1224 (S.D. Miss. 1983)) does not render the instant case indistinguishable from *Allstate* for the purposes of jurisdiction. Irrespective of this Court's determination as to the bases for the EEOC's *Allstate* appeal, there is no question that the district court in this case held Reorganization Plan No. 1 unconstitutional, and that it viewed *Allstate* as reaching the same result. More significantly, the lower court in *Allstate* clearly premised any holding concerning Reorganization Plan No. 1's constitutionality on the severability of the Reorganization Act's one-House veto provision. In the instant case, the district court did not even address the issue of severability (in keeping with Westinghouse's contention that an evaluation of severability was unnecessary). This further indicates that the court held Reorganization Plan No. 1 unconstitutional without relying on the "non-constitutional" bases for the lower court decision in *Allstate*.

No. 1.[9] The EEOC should not be permitted to redefine the lower court's decision for the sole purpose of avoiding Section § 1252 jurisdiction. In this case, as in *United States v. Raines*, 362 U.S. 17 (1960), "[u]nder the terms of 28 U.S.C. § 1252, the case is properly here on appeal since the basis of the decision below in fact was that [an] Act of Congress was unconstitutional, *no matter what the contentions of the parties might be as to what its proper basis should have been.*" *Id.* at 20 (emphasis added).

The EEOC incorrectly suggests in its jurisdictional statement that this Court's decision in *Heckler v. Edwards*, 52 U.S.L.W. 4373 (March 21, 1984) prevents Section 1252 jurisdiction over the instant appeal. Although *Heckler v. Edwards* demonstrates that Section 1252 jurisdiction does not exist "unless the holding of federal statutory unconstitutionality is in issue" (52 U.S.L.W. at 4374), the lower court's holdings of unconstitutionality—particularly that Reorganization Plan No. 1 is

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[9] Reorganization Plan No. 1's transfer of Equal Pay Act enforcement from the Department of Labor to the EEOC certainly constituted a legislative act subject to the requirements of Article I, and an "Act of Congress" capable of establishing jurisdiction under Section 1252. In *Chadha*, this Court held that, in determining whether a decision was "legislative in its character and effect" (51 U.S.L.W. at 4916 [citation omitted]), the Court must scrutinize whether the decision had the purpose and effect of altering legal rights, duties and relations of persons outside the legislative branch. In addition, the Court evaluated the character of Congressional action supplanted by the decision.

Under both of these tests, it is clear that Reorganization Plan No. 1 was a legislative act. By transferring Equal Pay Act enforcement from one executive agency to another, the Reorganization Plan clearly altered the legal rights, duties and relations of non-legislative bodies. Moreover, concerning the Congressional action supplanted by Reorganization Plan No. 1, the Reorganization Plan effectively amended the Equal Pay Act and/or FLSA which, under *Chadha*, would be constitutionally sufficient *only* if the amendment process comported with the requirements of Article I. *See Chadha*, 51 U.S.L.W. at 4917.

unconstitutional—are clearly contested by the EEOC, which renders *Heckler v. Edwards* inapposite.

The situation presented in *Heckler* was clearly different from the present case. In *Heckler*, a plaintiff had sued the Secretary of Health and Human Services seeking to have a portion of the Social Security Act (which authorized a gender-based allocation of earnings) declared unconstitutional. To stop the ongoing application of the challenged statutory section (*see* 52 U.S.L.W. at 4374 n.5 and accompanying text), the district court held the challenged section unconstitutional, determined that retroactive application of its holding of unconstitutionality was appropriate, and recomputed the earnings that had previously been covered by the unconstitutional provision.

Prior to seeking review of the district court's judgment in *Heckler*, the defendant agreed to no longer enforce the unconstitutional statute anywhere. 52 U.S.L.W. at 4376. Similarly, the defendant did not challenge the district court's retroactive holding of unconstitutionality on appeal. *Id.* at 4374. Instead, the defendant *only* challenged the district court's remedy—*i.e.*, the formula devised by the district court for recomputing earnings that had formerly been covered by the unconstitutional provision. *Id.* at 4374 n.7 and accompanying text.

Here, unlike the situation in *Heckler*, the EEOC has *not* agreed to refrain from giving force and effect to Reorganization Plan No. 1, which was held unconstitutional below. Also unlike the situation in *Heckler*, the EEOC in the instant appeal specifically contests retroactive application of the lower court holding of unconstitutionality. While the issues in *Heckler* did relate merely to the district court's "remedy," those in the present case do not. *Heckler* is clearly distinguishable on this basis.

The EEOC's contention that it only challenges the "remedy" authorized by the district court is merely a device employed in an attempt to avoid direct review in this Court. The EEOC clearly misinterprets the lower court's holding, which resolved a

contested, substantive constitutional issue and did not merely constitute "relief."

The EEOC's statement that it merely challenges the "remedy" authorized by the district court improperly ignores Westinghouse's *direct* constitutional challenge to the process by which the Equal Pay Act and/or FLSA were modified to provide for EEOC enforcement. An extended evaluation of the Reorganization Act or the Act's one-House veto provision is not required prior to concluding that statutes cannot constitutionally be amended (as they were in Reorganization Plan No.1) by the President acting alone.[10] This was the principal constitutional position taken by Westinghouse below, which the EEOC obviously and necessarily contests in this case.

Under the EEOC's position, the Commission (or other government agencies held to be acting in disregard of the Constitution) can avoid direct Supreme Court review by alleging that a district court ruling was based entirely on a particular rationale, notwithstanding broader or different rationales that were articulated by the district court and relied upon by the opposing party below. Westinghouse submits that Congress in enacting Section 1252 and this Court in deciding *Heckler v. Edwards, supra,* did not intend to condone such attempts to avoid direct review under Section 1252.

The EEOC in the instant appeal, unlike the appeal in *Allstate,* seeks not to "be bound by a direct holding that the law in question [Reorganization Plan No. 1] is unconstitutional." *Heckler v. Edwards,* 52 U.S.L.W. at 4376. For this reason, this Court should conclude that Section 1252 jurisdiction exists.

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[10] *See Chadha,* 51 U.S.L.W. at 4917 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I" [footnote omitted]).

II. The Questions Presented Are Unsubstantial And Should Be Summarily Affirmed

1. As noted above, the constitutional issue resolved by the district court was whether the President may constitutionally be given free rein to amend statutes and effectively enact legislation without the Congressional approval which is required by the Constitution. Reorganization Plan No. 1—the sole source of the EEOC's right to participate in this suit—was enacted into law without bicameral legislative action. Because this Court indicated in *Chadha* that "enact[ment] . . . by mere silence cannot be squared with Art. I" (51 U.S.L.W. at 4918 n.22), Reorganization Plan No. 1 is patently unconstitutional and, for this reason, the district court correctly decided that the EEOC could not constitutionally participate in this action.[11]

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[11] For the reasons discussed previously, Westinghouse maintains that an evaluation of Reorganization Act Section 906(a)'s severability is not essential to a holding that Reorganization Plan No. 1 is unconstitutional. However, to the extent that severability is deemed relevant, Westinghouse submits that the one-House veto provision in Reorganization Act Section 906(a) clearly is *not* severable from the Reorganization Act generally. The Reorganization Act on its face demonstrates that Congressional review by way of the one-House veto in Section 906(a) was an integral part of the statute and was clearly essential to its enactment. More importantly, the Reorganization Act's legislative history reveals that Congress would *never* have enacted the Reorganization Act without retaining some sort of legislative control over reorganization plans proposed by the President. *See* H.R. Rep. No. 105, 95th Cong., 1st Sess. 8, *reprinted in* 1977 U.S. Code Cong. & Ad. News 48 ("A major objective of the sponsors of this legislation was to develop a procedure under which an opportunity for a vote by Congress *will be assured on each plan*" [emphasis added]). *See also* H.R. Rep. No. 105, 95th Cong., 1st Sess. 9-10, *reprinted in* 1977 U.S. Code Cong. & Ad. News 49-50 (remarks of Representative Brooks); H.R. Rep. No. 105, 95th Cong., 1st Sess. 38, *reprinted in* 1977 U.S. Code Cong. & Ad. News 65 (remarks of Representative Conyers); H.R. Rep. No. 105, 95th Cong., 1st Sess. 37, *reprinted in* 1977 U.S. Code Cong. & Ad. News 64 (remarks of Representative Rosenthal); 123 Cong. Rec. 9344 (1977) (remarks of Representative Brooks).

2. The EEOC below asserted that Congress' failure to affirmatively enact Reorganization Plan No. 1 should be excused because of an isolated reference to Reorganization Plan No. 1 in the Civil Service Reform Act of 1978, 92 Stat. 1111, and Congressional appropriations that ostensibly provide for Equal Pay Act enforcement by the EEOC. These acts of "ratification" are clearly inadequate to correct the constitutional deficiencies in Reorganization Plan No. 1. This Court noted in *Chadha* that Article I's requirements of bicameralism, presentment and separation of powers were designed to ensure full Congressional *participation* in the enactment of legislation. 51 U.S.L.W. at 4918 n.22. The substitutes for bicameral legislative enactment identified by the EEOC do not come close to resembling the "step-by-step *deliberate and deliberative process*" that Article I of the Constitution was designed to guarantee. *See Chadha*, 51 U.S.L.W. at 4918 (emphasis added).[12]

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[12] With respect to possible "statutory ratification" *vis-a-vis* Section 905 of the Civil Service Reform Act of 1978 ("Reform Act"), 92 Stat. 1111, Section 905 of the Act indicates that inconsistent provisions of Reorganization Plans No. 1 and 2 were to be superseded. Section 905 was obviously intended by Congress to ensure that the Civil Service Reform Act of 1978 would operate as an integrated whole, irrespective of any conflicting provisions in prior reorganization proposals enacted by President Carter. This suggests, if anything, that the attention and deliberation of Congress in enacting Reform Act Section 905 was focused *not* on Reorganization Plan No. 1 but on the Reform Act itself, which did not deal with the transfer of Equal Pay Act enforcement power from the Department of Labor to the EEOC. Concerning any possible "ratification by appropriation" of Reorganization Plan No. 1, recent decisions of this Court demonstrate that whatever tolerance the Court may once have had for that concept has been greatly reduced. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190-91 (1978); *Greene v. McElroy*, 360 U.S. 474, 506-507 (1959). *See also Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Pacific Legal Foundation v. Goyan*, 664 F.2d 1221, 1226 (4th Cir. 1981).

3. In view of the Commision's obvious intention to give Reorganization Plan No. 1 full force and effect by continuing to enforce the Equal Pay Act, this action does not present any legitimate questions concerning retroactivity. Westinghouse in this action has been sued by a government agency that lacks constitutionally-valid authority to enforce the statute upon which this lawsuit is based. The district court prohibited the EEOC from future application of the Equal Pay Act by preventing any continuation of the instant action. Thus, the court's holding of unconstitutionality was applied *prospectively*, and not merely retroactively.[13]

The transfer of Equal Pay Act enforcement to the EEOC in Reorganization Plan No. 1 did not comply with the "carefully crafted restraints" spelled out in Article I of the Constitution. *Chadha*, 51 U.S.L.W. at 4918. Although the EEOC attempts to gloss over this major constitutional problem, the fact remains

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[13] Even if the Court were to determine that the instant case does involve issues of retroactivity, it is clear that all three of the factors governing retroactivity, set out in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), favor application of a holding of unconstitutionality in this case. First, Congress was clearly aware that reorganization plans ostensibly authorized by the Reorganization Act of 1977 might very well be held unconstitutional in the future, thus the lower court holding that Reorganization Plan No. 1 was unconstitutional was "clearly foreshadowed." *See, e.g.*, 123 Cong. Rec. 9363-65 (1977). *See also* note 11, *supra*. Second, any holding that the EEOC lacks a constitutional basis for enforcing the Equal Pay Act can *only* be furthered by dismissal of actions like the instant case. Third, concerning any inequities that could be caused by "retroactive" application of a holding of unconstitutionality in this case, this Court in *Chadha* explicitly acknowledged that its holding could have far-reaching effects. However, the Court still applied its holding retroactively and concluded that its "inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies. . . ." 51 U.S.L.W. at 4914.

that, in this case, the provisions of the Equal Pay Act and/or FLSA were amended by the President acting alone. This manner of enacting or amending legislation is certainly unconstitutional, which the lower court properly recognized when it granted Westinghouse's Motion to Dismiss.

CONCLUSION

For the reasons set forth herein, Appellee Westinghouse Electric Corporation requests that this Court exercise its jurisdiction under 28 U.S.C. § 1252 and affirm the judgment order of the district court.

Respectfully submitted,

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